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NO. 83-945

IN THE

Supreme Court of the United States

October Term, 1983

Union Oil Company of California,

Petitioner,

vs.

Dillingham Tug & Barge Corporation,
Nickum & Spaulding Associates, Inc.

and

The Salvage Association,

Respondents

BRIEF OF NICKUM & SPAULDING ASSOCIATES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Insofar as Nickum & Spaulding are concerned, the only question presented by the Petition for Certiorari of Union Oil Company is whether there is a sufficient issue for United States Supreme Court review where a court of appeals has found a trial court clearly erroneous under Civil Rule 52(a) in making a decision on a factual finding based on admittedly impeached and totally unreliable evidence.

STATEMENT OF THE CASE

I. Facts.

Nickum & Spaulding are naval architects who were employed by Union Oil Company to prepare an open hopper barge designed exclusively for river use for a one time only ocean tow from Galveston, Texas to Portland, Oregon through the Panama Canal. The barge was 300 feet long and had an open hopper within which were placed two 280 feet

by 18 feet cylindrical tanks for containing and transporting anhydrous ammonia up the Columbia River. The purpose of the parties was to prepare the barge for the trip at a minimum reasonable expense. Union Oil had rejected a plan to place a cover over the hopper to keep out water as being too expensive. (F. 9; 548 F. Supp., at 693)

The transportation plan was a compromise of furnishing sufficient metal straps welded to the barge and passing over the tops of the tanks to assure that the empty tanks would not float away if the hopper should fill with water due to some accident or condition and cautioning the towing company, Dillingham, to, inter alia, handle the tow with great care, keep the hopper dry, not exceed 8 knots and:

> Towing speed to be regulated consistent with good seamanship and to conform with weather conditions in order to eliminate possible pounding damage. (Exhibit 85).

Gordon Snyder, the principal naval architect in charge for Nickum & Spaulding, prepared calculations, in part as required by the Coast Guard, showing that if the vessel filled with water, the straps were sufficient to retain the tanks in position. The calculations were based on a static condition but had a 2:1 margin of stress capacity over the calculated stress to be encountered. This safety margin was deemed adequate by Mr. Snyder and by Mr. David B. Waller, the naval architect retained by Salvage Association to review Mr. Snyder's calculations. (TR 1300)

There was no computer or other program reasonably available from which precise stress measurements could be made in the maximum dynamic stress condition of the vessel resting across the pinnacle of a design (maximum) wave, at least without excessive cost, because of the unique

structure of the barge COLUMBIA as modified. (TR 979)

An after-the-fact attempt to apply the MMT-10 Coast Guard computer program produced the undisputably unreliable results noted by the Court of Appeals (707 F.2d at 1092) in its opinion in which it found the District Court clearly erroneous in basing a factual finding on such unreliable and impeached evidence.

The tow successfully completed approximately 70% of its trip until the early morning (0200) of February 25, 1977 when it encountered heavy seas (10-12 foot waves) head on while towing at maximum speed. Although the bow of the barge was observed as being down at 0700, demonstrating the existence of substantial water in the hopper, the tow continued on course directly into and across "rough northwesterly swells" with minimal speed reductions. At 1235, the bow was so far down

that the tow captain elected to slightly change course from 315° to 345° to Bahia Ballenas, 120 miles away, still directly into the heavy seas. (F. 26-35; 548 F. Supp. at 696)

During this entire morning, a protected cove, Bahia Santa Maria, was 20 miles away on a course of approximately 110°. This course would have put the barge in the trough of the waves, eliminating the maximum longitudinal stresses encountered when crossing the waves, and furnished an anchorage which was well protected, had good depth and was one of the best possible refuges on the coast. (TR 1082)

The barge lost its first tank at 1305, after which it did change course to Bahia Santa Maria, its second tank at 1517. The barge itself was not lost until 1900, only 4 miles from the refuge.

II. Proceedings in Courts Below.

The District Court (548 F. Supp. 691) found in Finding of Fact No. 11 that Nickum & Spaulding never advised Collier (Union) that there was an increased risk by removing the cover nor did they advise Collier that the calculations were incomplete in any way or that proper calculations were not performed. (694)

At page 698, the District Court concluded that post-accident computer calculations were performed and

> these calculations showed the straps were not sufficient. It is true that these calculations were performed over the objections of Mr. Snyder and he did not agree with the results (omitted material). The errors in calculations and particularly the failure to advise Collier, constituted negligence on the part of Nickum & Spaulding which directly contributed to the loss of the barge COLUMBIA by 20%.

The Court of Appeals reversed this conclusion with the following determination, 707 F.2d 1086 at p. 1092.

> In making this finding, the trial judge relied on post-accident computer printout results from a Coast Guard MMT-10 computer printout.
> This program was used to analyze stresses in conventional barges, but there was uncontradicted testimony from three experts that the program did not produce reliable results when applied to the COLUMBIA.[6] It was clearly erroneous for the trial judge to base his finding on this concededly unreliable program.

It is this ruling for which the petitioner seeks review.

ARGUMENT

I. There Are No Special or Important Reasons for Granting Certiorari in This Case, at Least as it Relates to the Issues Involving Nickum & Spaulding Associates.

As indicated above, the District Court assessed 20% liability against Nickum & Spaulding for the barge loss damages it awarded to Union because the court concluded that Nickum & Spaulding was negligent in not utilizing a Coast Guard MMT computer program for the purpose of measuring the maximum stress which could be borne by

the metal tie down straps on the barge COLUMBIA in a hopper flooded condition or in not advising Union that Nickum & Spaulding had not performed these calculations. (Petition, Appendix, p. 28, Conclusion 5)

In reversing, the Court of Appeals noted that the results of this computer program were not only deemed erroneous by Mr. Snyder and Mr. Stern but also by Union Oil Company's own witness, Mr. Maris, because of the "very suspicious" numbers produced by the program and who stated it would cause him to "question both the program and the input data into the program." 707 F.2d 1086 at 1092, fn. 6.

The petitioner requests this court to undertake on certiorari a review of a review by the Court of Appeals of a District Court's decision on an entirely evidentiary matter. The only conceivable category and the one urged by the petitioner under Rule 17(a) entitled "Considerations

Governing Review on Certiorari" is that the Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

It certainly needs no case citation to sustain the proposition that a trial judge's decision based on totally impeached evidence should be reversed. Far from being a departure, the Court of Appeals decision in this case was a simple application of Civil Rule 52(a) as interpreted by this court in United States v. United States Gypsum Company, 333 U.S. 364, 92 L.Ed. 746, at page 396 of U.S.

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

The issue in the present case involves only Union Oil Company, Nickum & Spaulding

and The Salvage Association, whose relevant contentions on this issue in its brief in opposition to the petition are fully supported by Nickum & Spaulding. The factual pattern of the case is unique, nonrecurring, involves only money damages and has no public importance or interest whatsoever. The legal issue in applying Rule 52(a) is well settled and routine. There is no reason for granting certiorari.

II. Court of Appeals Finding of No Causation is Fully Justified and is Not a Departure from the Accepted and Usual Course of Judicial Proceedings.

Gordon Snyder, the principal naval architect involved with Nickum & Spaulding in designing the modifications for the COLUMBIA, did perform calculations as to the anticipated stresses and stated that the manner of making these calculations represented the only feasible procedure by which the problem could be analyzed with existing programs and within the time involved (TR 979). He had originally

recognized the nonsuitability of the MMT-10 program as applied to the structural configuration of the COLUMBIA. (F. 5, 548 F. Supp. at 698)

Snyder's calculations were reviewed and approved as adequate prior to modification of the barge by the naval architect employed by The Salvage Association, David B. Waller (TR 1300).

Because the calculations performed by Snyder did not precisely predict the maximum stress which might be encountered on the straps with the hopper flooded and while the vessel was balanced on the pinnacle of a design wave, the appellate court sustained the trial court in the abstract finding that it was negligent not to advise the client that such calculation had not or could not be made.

However, both Snyder and Waller concluded that there was more than sufficient stress margin to complete the tow as contem-

plated if the tow were properly handled. (TR 1300) As found by the Court of Appeals, this conclusion was sustained by the other naval architect experts testifying at the trial including Union's expert. The appellate court properly reasoned that if the tow could be accomplished if handled in accordance with the tow instructions and good seamanship practices, then the sole proximate cause of the loss was the negligence of Dillingham in failing to handle the tow in that manner. (707 F.2d at 1093)

In an effort to avoid this logic, Union in its petition cites several pages of testimony establishing that Snyder and other parties were aware that the hopper of the COLUMBIA might be flooded and that the hold down straps had to be designed to withstand the lift off stress imposed by the empty 280 foot tanks if this event should happen. (Petition, pp. 15-20) Union then states in its petition, at p. 19, that

> Contrary to the predictions of N & S, on the first occasion the COLUMBIA flooded, the straps broke, the cargo tanks floated free and the barge sank.
>
> Admittedly the cause for water entering the hopper was Dillingham's negligence. However, N & S had supposedly anticipated this contingency by designing a barge that would stay afloat with its hopper flooded.

What Union has totally disregarded is the impact of Dillingham's continued exposure of the barge to the maximum possible stresses over a period of many hours after the hopper commenced filling from waves being encountered head on with the water intake progressing as the bow rode lower into the waves. As the Court of Appeals noted from the record, Union did not want and did not want to pay for a "ocean going barge." (707 F.2d at 1093) It wanted the least expensive modifications reasonably necessary to accomplish a one time tow to the Columbia River. For any barge to have stood the pounding imposed on it by the

Dillingham tow on February 25, it would have had to have been a fully structured ocean going barge.

What was clearly contemplated and the towing crew was so instructed in detail, is that if conditions were encountered wherein water was taken into the hopper, including to the point of being full, the tow would make every effort to minimize stress on the vessel by course and speed selection until the barge could be pumped dry. As naval architect Waller testified, a full hopper was an emergency, extremus condition (TR 1226-1228). From this it can be concluded it was not a condition to be substantially disregarded while the captain of the tow bypassed a refuge 20 miles away to head for one 120 miles away while traveling at 6 knots.

In fact, the barge performed quite well under the circumstances. Although it had been taking on water from 0200 to the

point where the bow was down at 0700 and heavily down by 1235, the straps on one tank lasted until 1305 and the other until 1517. The barge itself was not lost until 1900, just 4 miles from safe haven. (548 F. Supp. at 696).

A turn to Bahia Santa Maria at any time from the first observance of trouble at 0700 until the loss of the tank at 1305 would have undoubtedly saved the tow by heading for a shelter which was only three or for hours away while the barge proceeded in the direction of the trough of the waves, going from maximum to minimum stress.

Even if the Supreme Court were to disagree with the appellate court on its evaluation of the evidence and its application of the logic of proximate cause, such a disagreement would still not be a "departure from the accepted and usual course of judicial proceedings" nor would it call for the exercise of the power of supervision. In

the present case, the appellate decision is so clearly correct as to render Union's petition in this regard virtually frivolous. The petition for certiorari on this issue should be denied.

Respectfully submitted,

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Rule 28.1 certification

Marine Management International Corporation is an affiliated corporation to Nickum & Spaulding Associates, Inc.

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